Apogee Retail, NY, LLC d/b/a Unique Thrift Store *and* Local 338, RWDSU/UFCW. Cases 02–CA–133989, 02–CA–134059, and 02–CA–137166

February 17, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On July 30, 2015, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed a brief in support of the judge's decision, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to dismiss the complaint in its entirety.[4]

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C. February 17, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Moriah H. Berger Esq., for the General Counsel.
Lewis Goldberg Esq. and *Josh Beldner Esq.,* for the Respondent.
Jae W. Chun Esq. and *William Anspach Esq.,* for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case on March 31 to April 6, 2015, in New York, New York. The charges and amended charges in this proceeding were filed

[1] The General Counsel has not excepted to the judge's finding that the Respondent did not engage in unlawful surveillance in violation of Sec. 8(a)(1).

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings.

In adopting the judge's factual findings, we do not rely on (1) his statement that David Kloeber, the Respondent's CEO, gave "unrebutted" testimony regarding Union Representative Neil Gonzalvo's response at the parties' June 26, 2014 meeting to the Respondent's concerns about the proposed union security and check-off provisions; and (2) his statement that the parties agreed to a 24-cent-per-hour raise for the first year of the contract and the other calculations and assertions set forth in footnote 3 of his decision. The parties aver (and the evidence supports) that they agreed to a 25-cent-per-hour raise. Nonetheless, we find that these errors do not affect the result in this case.

[3] The Board agrees that under the facts of this case, the Respondent's statements to employees that wages were frozen pending the outcome of negotiations did not violate Sec. 8(a)(1) of the Act. See *Flexsteel Industry*, 311 NLRB 257, 257 (1993) (finding lawful the employer's statement to employees that it could not unilaterally give a wage increase during contract negotiations); *Mantrose-Haeuser Co.*, 306 NLRB 377, 377–378 (1992) (same, where employer's literature stated that "while bargaining goes on, wage and benefit programs typically remain frozen until changed, if at all, by contract").

In adopting the judge's finding that the Respondent did not bargain in bad faith, we do not rely on his statement that "I know of no other type of mandatory contract proposal that would require, as a matter of law, that the proposal's opponent justify or offer a reason for its opposition." We note that "[g]ood faith bargaining . . . does require that parties justify positions taken by reasoned discussions[.]" *Blue Jeans Corp.*, 177 NLRB 198, 206 (1969), enfd. sub nom. *Amalgamated Clothing Workers of America v. NLRB*, 432 F.2d 1341 (D.C. Cir. 1970). Therefore, the "failure to define, explain, or advocate [a] position" during bargaining should be considered as evidence of a party's lack of good faith. *Palestine Coca Cola Bottling Co., Inc.*, 269 NLRB 639, 645 (1984). Here, however, we agree with that judge that, based on the Respondent's overall course of conduct, the General Counsel has failed to establish that the Respondent bargained in bad faith.

Member Miscimarra believes that a failure to explain a bargaining position *may* be evidence of bad-faith bargaining, but this depends on the circumstances of the particular case. For example, he believes it is permissible under Sections 8(a)(5) and 8(b)(3) for employers or unions to insist on certain proposals that may be deemed critical for reasons that the negotiators may be reluctant or unwilling to disclose, and it is likewise lawful for a party to insist on certain proposals exclusively because it believes sufficient leverage exists to force the other party to agree. In these and other circumstances, Member Miscimarra believes a failure to explain positions taken in bargaining would not necessarily tend to establish an intention to frustrate agreement, which is the touchstone of bad-faith bargaining. See, e.g., *88 Transit Lines*, 300 NLRB 177, 178 (1990); *Reichhold Chemicals*, 288 NLRB 69, 69 (1988). Cf. *NLRB v. American National Insurance Co*., 343 U.S. 395, 404 (1952) ("[T]he Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position.").

[4] Although the judge concluded that the complaint should be dismissed, he inadvertently failed to include in his decision a recommended order that the complaint be dismissed.

on August 4, 5, September 19, November 19, and December 4, 2014. The complaint which issued on January 30, 2015, alleged in substance:

1. That in or about April, mid-June and August 2014, the Respondent by Naomi Santana aka Naomi Nazario and Sameh Mekhueil, told employees (a) that they had not received and would not receive wage increases because they were represented by the Union, (b) that if they wanted raises they should find other jobs, and (c) that they would receive wage increases if they rejected union representation.

2. That in or about mid-June 2014, the Respondent, by Mekhueil told employees that employees should work elsewhere if they wanted higher wages.

3. That on or about August 8, 2014, the Respondent by a security guard engaged in surveillance of employee union activity.

4. That during negotiations from July 9 through August 4, 2014, the Respondent sought to avoid reaching an agreement by (a) refusing to explain its reasons why it would not agree to the Union's proposals for union security and dues-checkoff clauses; (b) failing to respond to the Union's proposals dated July 24, 2014; and (c) by its overall conduct showing bad faith bargaining.

At the hearing, the Respondent admitted that Naomi Santana was an agent within the meaning of Section 2(13) of the Act. In this regard, the evidence showed that she was trained and authorized to speak on behalf of the Employer to answer employee questions regarding the Union and/or wage increases.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

It is admitted and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(1), (2), (6) and (7) of the Act. I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Negotiations and the Alleged 8(a)(5) Violation

The Respondent, which is based in Phoenix, Arizona, is owned by David Kloeber. It operates 11 retail stores in the New York Metropolitan area that sell second hand clothing, jewelry, accessories and furniture. One of the New York City managers is Dave Morley and the store located in the Bronx, is run by Sameh Mekhueil. The head of security is Paul Dalton. The complaint alleged that Naomi Santana is a supervisor within the meaning of Section 2(11) of the Act. Nevertheless, because the Respondent admits that she is its agent pursuant to Section 2(13), it is unnecessary to make a finding as to her supervisory status inasmuch as any statements that she made to employees about the Union were authorized by the Company and are binding on it.

Originally back in 2013, the RWDSU organized the employees of the Bronx store which employs approximately 60 people in positions including production workers, maintenance workers and cashiers. In April 2013, the RWDSU won a Board conducted election and was certified. Thereafter, bargaining took place for several months between that labor organization and the Employer.

In late 2013 or early 2014, the RWDSU decided to transfer its bargaining rights to Local 338 and a meeting was held with the Employer with the object of obtaining the Respondent's consent to the transfer. This was opposed and a charge was filed in Case 02–CA–104237. That charge was thereafter resolved by a non-Board settlement dated March 28, 2014, wherein the Respondent agreed to recognize and bargain with Local 338 for the previously certified bargaining unit.

On April 25, 2014, the Respondent's attorney, Stuart Weinberger, sent an email to Neil Gonzalvo, Local 338's chief negotiator, forwarding the previous contract proposals that had been made by the Company and the RWDSU during the earlier negotiations.

On May 1, 2014, the first negotiation session was held between the Company and Local 338. At this meeting, the parties reviewed the previous contract proposals and Gonzalvo stated that he would prepare and tender a new union contract proposal before the next meeting. To the extent that there was any discussion of article 3, which contained union security and dues-checkoff clauses, Weinberger indicated that the earlier RWDSU proposal was illegal because it did not give employees the full 31 days before having to become a union member. Gonzalvo stated that he would prepare an alternative article 3.

On May 21, 2014, Gonzalvo had a lengthy phone conversation during which he emailed a series of contract proposals, not including a new union security and dues-checkoff provision.

By email dated June 17, Gonzalvo sent a contract proposal containing a revised article 3. This consisted of four paragraphs as follows:

1. A standard union security language but with 90 days to join from the effective date or the execution date of the contract which is later.

2. A union dues-checkoff provision whereby upon receipt of written authorizations, the Employer would deduct union dues/fees from the wages of its bargaining unit employees.

3. An agreement whereby the Employer agreed to deduct contributions to a Political Action Committee from those employees who voluntarily authorized such deductions.

4. A provision that permits the Company to hire whoever it wants.

The proffered contract also contained a wage proposal that called for a $1-per-hour increase during the first year of the contract for employees who completed a trial period; a $1-per-hour raise for the second year of the contract; and a $1-per-hour raise for the third year of the contract.

On June 26, 2014, the negotiators met at the office of the Union's counsel. This meeting was held with Gonzalvo being the chief negotiator for the Union and Weinberger and company owner Kloeber representing the Employer.

During the June 26 meeting, Mr. Kloeber questioned Gonzalvo as to what exactly a union-security clause would require. After Weinberger explained that a union security

[1] The General Counsel's unopposed motion to correct the transcript is granted.

clause requires, as a condition of continued employment, union membership after the stated time, Kloeber raised a number of questions. One issue was whether the Company could be sued if it was forced to discharge an employee who failed to pay union dues.[2] There were other issues raised by Kloeber including his observation that many of his employees were paid the minimum wage and even with a wage increase many, if they had dues deducted from their wages, would still be earning at or below the minimum wage.[3] Additionally, Weinberger stated that in his view the Political Action Committee provision might violate New York State law. The unrebutted testimony was that Gonzalvo replied that these were great questions and that he would get back to them. He didn't.

On June 27, 2014 an employee named Ramon Steffani filed a petition in Case 02–RD–131679 seeking to decertify the Union. Thereafter, the Acting Regional Director approved a Stipulated Election Agreement on July 11, 2014. The election was scheduled for August 8, 2014, between the hours of 11 a.m. and 2 p.m.

On July 9, Gonzalvo sent a modified contract proposal to Weinberger. This did not contain any modification of the previously tendered union security and dues-checkoff provisions. (article 3) In this proposal, the Union asked for a 75-cent-per-hour increase for the first year and a 25-cent-per-hour increase for the second and third years of a contract.

The parties met again on July 9 at the offices of the Union's attorney. Attending for the Company were Kloeber, Weinberger and Annette Aletor, an associate in Weinberger's office. Attending for the Union were Gonzalvo, Yomaira Franqui and the Union's attorney, William Anspath. After reviewing the various contract proposals, Gonzalvo asked if the Company was going to agree to the union security proposals. Weinberger said that the Company would not agree at that time. When Anspach pressed Weinberger as to why the Company would not agree, Weinberger responded that he did not have to agree. Not much else was said at this meeting and there was no discussion by either side about the various questions or issues that had been raised by Kloeber at the June 26 meeting.

On July 17, Gonzalvo sent another modified contract proposal which although modifying certain issues, did not modify the Union's proposed union security and dues-checkoff provisions in article 3. However, Gonzalvo did indicate that the section of article 3 relating to political action contributions was open. Shortly thereafter, Weinberger replied that he would review the proposal and respond the following day.

Notwithstanding Weinberger's statement that he would respond by July 18, he didn't find the time to do so and Anspach called him on July 22. During that call, Weinberger expressed concern that the political action section of article 3 could violate New York law.

On July 23, Weinberger emailed a contract proposal with some minor modifications but rejecting all of article 3.

On July 24, Gonzalvo and Anspach held a conference call with Weinberger. During this call, Anspach stated that the Union was agreeing to the Company's version of certain proposals but that the Union wanted to include the previously tendered union security and dues-checkoff clauses as they appeared in the Union's contract proposal. Weinberger responded that he would speak to Kloeber.

On Friday, July 25, after speaking to Kloeber, Weinberger sent an email to Anspach in which he stated:

> I want to talk to Dave regarding what we discussed yesterday. However, I want to be clear on what was proposed and what was not proposed. You stated that it was a package. Can you or Neil indicate the changes that the union would agree to in the document that I sent you. It will only take a few minutes to do so. There are a couple of other issues to deal with. First, I will discuss with the company language on part-timers. Second I will discuss the union security clause with the company.

It should be noted that by July 25, the Union had conceded and agreed on all open issues, except for the union-security and checkoff clauses, and the parties had agreed to a series of small wage increases. As to the part-timer question, this was not really an issue because the parties had agreed on the concept but had not yet put it into appropriate language.

Anspach expressed the opinion that as there was agreement on all open issues except for article 3, there was no need for the Union to give a written response, as requested by Weinberger. But lawyers act like lawyers, and I see nothing nefarious in Weinberger's request for a written document nailing down what had been agreed to. In any event, Weinberger's email was sent at 4:52 p.m. and Anspach may have received it either on that Friday or on the following Monday, July 28.

On July 28, Anspach sent an email to Weinberger detailing nine items where the Union had agreed to the Company's proposals. This email also withdrew that portion of article 3 relating to the political action fund. This, therefore made it explicit that from the Union's point of view, the only remaining open issue was article 3 insofar as the union security and dues checkoff provisions.

Weinberger and Kloeber testified that when this last email was sent to Kloeber, he told Weinberger that they still had not gotten any answers to the issues raised at the June 26 meeting and that these should be resolved. Kloeber testified that he was particularly concerned that given the agreed upon wage increases, some employees would be earning less than the minimum wage if they were required to pay union dues.

Between July 28 and July 30, Anspach and Weinberger exchanged some emails discussing who was at fault for not re-

[2] Indeed, an employer can be held liable in some situations where it accedes to a union's request for an employee's discharge pursuant to a union security clause. For example, if a union claims dues for time when an employee is not employed by the employer, a union and the employer could be jointly and severally liable for the discharge of an employee who hadn't paid dues during his period of absence.

[3] Union dues for full-time employees were $38 per month. It was somewhat less for part timers. As of the June 26 meeting, the parties had agreed to a 24-cent-per-hour raise for first year of a contract and this would have amounted to a $40 per month increase for an employee who worked 40 hours per week. Thus, a net gain of $2 per month. It would also mean that for those employees who worked overtime, they would have a larger net gain. However, for employees who worked 32 to 40 hours per week, they would have incurred a net loss if they had to pay union dues.

sponding quickly. In the context of this case, this is not relevant.

On July 30, at 8:44 a.m. Anspach sent an email to Weinberger that stated:

> As of last Thursday, we made it clear that there are no remaining issues other than the Union Security/Checkoff, (you can provide language on the part-timers, but we've already agreed to accept your current policy).
>
> Now nearly a week later, we still need to know your client's position on the Union Security/Checkoff. I have yet to hear any reason for your client to reject those, particularly since we don't live in Alabama.

On July 30 at 11:39 p.m., Weinberger responded:

> As I am sure that the Union is aware, there are contracts with unions that do not have dues-check off. I think the Union is aware that many employers do not wish to get involved in the check-off of dues for many reasons, including but not limited to, that they do not want to [be] responsible from checking off dues and the issues that arise with checking off the dues.
>
> While the union security provision is a mandatory subject of bargaining, the NLRB as recently as 2013 said the employer is not required to agree to a union security provision that is proposed by the Union. The ALJ in that case held that "[A]n employer may insist on not having a union-security clause at all..". Your statement that New York is not Alabama does not mean there are not contracts with unions that do not have a union security clause as proposed by the Union. I am sure that the Union is aware of the reasons why employers have not agreed to union security clauses that have been proposed by the Union.
>
> In any event, the Company is willing to bargain with the Union and discuss these provisions in accordance with applicable law.

On July 31 at 8:38 a.m., Anspach sent an email to Weinberger which stated:

> Since we're down to one issue, (Union Security/Union Checkoff), we'd like to schedule a conference call today with you and your client to try to resolve it. Please indicate your availability. Thank you.

Weinberger replied at 11:50 that; "I am in Cherry Hill New Jersey now negotiating a contract. I am not available today for a conference call." To this, Anspach asked if Weinberger would be available on August 1. At 8:30 p.m. Weinberger replied:

> I have a meeting tomorrow on LI [Long Island] in the morning and possibly Yonkers in the early afternoon. I can try to squeeze something in tomorrow. The Company also has to be present on the call.
>
> If you have any suggestions about arranging something for tomorrow, please e-mail them to me. We can also make arrangements to talk next week.

At 9:11 p.m., Anspach responded and stated that the Union would be available at any time on August 1.

On August 1 at 5:48 p.m. Anspach sent the following email to Weinberger:

> I never heard back from you (see email exchange below).
>
> As a courtesy, I wanted to tell you that the Union has filed a ULP against Unique for bad faith bargaining. The Union essentially agreed to all of the Employer's proposals on July 24 –since then, the Employer has used the pretext of opposition to a Union Security/Checkoff provision in order to avoid reaching an agreement with the obvious purpose of running out the clock until the election.
>
> While you point to case law reflecting that an employer is not always required to accept Union Security clause, I believe the Board will consider the overall framework and chronology of the negotiations to conclude that the Employer's position is without foundation.
>
> We will document to the Board that your client's bad faith bargaining has caused a decline in support for the Union leading up to the election.
>
> Nonetheless, we remain available to bargain should your client have a change of heart.
>
> At 6:56 p.m. on the same day, Weinberger sent an email to Anspach stating:
>
> When I said last night I would try to squeeze in time I meant some solution like a call-in number. It is a sign that we are ready to bargain. We are ready to bargain. The Company has been and is ready to bargain. However, bargaining doesn't mean that we have to agree to everything the Union wants. That is not bargaining.
>
> I think filing the charge is a pretext to force the company to agree to a union security and a check-off provision and to delay the election. As I noted, there are union contracts without dues check-off. There are contracts without the union security provisions proposed by the Union. There is no case that says that the Board can force a party to agree to language that it does not want to agree to and has not agreed to.
>
> Moreover, to say that the Company has not bargained in good faith is incredible. There have been dozens of discussions and meetings that the parties have had as well as agreements on issues including wages, medical, just cause for a discharge, grievance and arbitration, etc.
>
> The Company is not going to respond to the Union's allegations about the running out the clock stuff, etc. If you want to bargain, the Union can call. The Union has my office and cell phone number. If you want to call my cell phone tonight, we can arrange for a time to bargain, which could be even tonight.

On August 2 at 11:27 a.m., Anspach sent the following email to Weinberger:

> It's silly to say that the Union wants the Employer to agree to everything desired by the Union. Quite to the contrary – the

> Union has made a vast number of concessions in order to try to reach an agreement.
>
> You're right that there's case law saying one party can't force another party to accept a proposal. But there's also abundant case law reflecting that one party can't turn down a proposal for no reason, particularly where there is the only remaining item.
>
> As for the mechanics of bargaining, we made a package proposal on July 24. You said that day you would speak with your client and get back to us. You then asked us, unnecessarily in our view, to reiterate the package proposal, which we did. But we still never heard back from you.
>
> If you wish to bargain, you can let us know when you and your client are available. Otherwise, we will continue to prosecute the charge.

On Sunday, August 3 at 23:29 p.m., Weinberger sent another email to Anspach which stated:

> I believe that you're e-mail has several statements that are fundamentally incorrect. First, you keep saying that the Company has rejected the clauses for no reason. That is not true. I think my e-mail the other day outlined reasons. If not, we are certainly willing to bargain and discuss these issues. I have e-mailed you several times in the last week that the Company is willing to bargain and talk about this.
>
> Second, the Company has not summarily turned down these proposals. The Company is willing to discuss alternatives to the language proposed by the Union. The Union apparently does not want to discuss alternatives.
>
> Third, within a matter of a couple of days or if not immediately, the Company has responded to all of the Union's proposal.
>
> Fourth, I will repeat what I said above, the Company will bargain and discuss the issues with the union. It is Sunday, but I will try to contact the Company and see when we can talk. If the Union wants to present other alternatives, please send me the alternatives.

On Monday, August 4, 2014, at 2:38, the following email was sent by Weinberger to Anspach:

> We can have a conference later today. Otherwise we can make arrangements to talk tomorrow or another day.

On Monday, August 4 at 2:58 p.m., Anspach emailed Weinberger asking when he and his client were available "today" and that he would check with the Union as to its availability. At 3:28, Weinberger emailed to say that he and the Company were available to talk by phone, between the hours of 4 p.m. and 5 p.m. Anspach replied that the Union was not available at that time and that he would check to see when they would be available.

On August 8, an election held by the Board's Regional Office and the ballots were impounded.

Subsequent to August 4, there were no further communications between the Union and the Employer. In this regard, Anspach testified that he felt, given the circumstances, that further communications by the Union would be futile and that it would now be up to the NLRB to resolve the bargaining issues.

B. Other Alleged Violations

In substance, the remaining allegations relate to conversations between Store Manager, Sameh Mekhueil and/or Naomi Santana with a number of employees in which it is alleged (a) that they had not received and would not receive wage increases because they were represented by the Union; (b) that if they wanted raises they should find other jobs; and (c) that they would receive wage increases if they rejected union representation. Additionally, it is alleged that a security guard who was at the Company's premises during the election, engaged in surveillance by following an employee and a union representative out to the parking lot.

In support of the first three allegations, the General Counsel offered the testimony of four employee witnesses; Abieo Ventura, Rosaura Tolentino, Jose Luis Tavira, and Marlon Colon.

In relation to their testimony about statements regarding raises, I note that almost all of the Company's employees, except for leads or persons labeled as supervisors (such as Santana), received the minimum wage. To the extent that pay increases were given in the past, the evidence shows that such raises were given only when the minimum wage was increased.

Rosaura Tolentino testified that the Company held a morning meeting each day where announcements were made to the employees by Sameh Mekhueil which were then translated by Naomi Santana for the Spanish speaking employees. She states that sometime in July 2014, at a morning meeting, Santana said that Dave Kloeber (the owner), was not going to give a raise and that although he had it ready to give it to us, he wasn't going to give it because of the Union.

According to Tolentino there was another occasion when, in a group of about 10 other employees, Santana was asked about raises and vacations and she responded that because of the Union, they were frozen; "that a long time would pass before they would give us a raise." Tolentino testified that on this occasion, Santana said, in effect, that if the employees were unhappy about their wages, they could find another job.

Finally, Tolentino testified that the store manager and Santana made statements over the Company's public address system to the effect that raises were frozen.

On cross examination, Tolentino testified that when Santana spoke about raises, she said that "it had to do with the Union and negotiations," and that she didn't know how long it was going to take to finish bargaining.

With respect to this person's testimony, I note that although there was testimony by other witnesses about the subject of raises and negotiations, none corroborated Tolentino's testimony that these statements were made at the morning meetings or over the public address system. Also, no one corroborated her testimony that they were told that employees could look for jobs elsewhere.

Abieo Ventura testified that in August, but before the August 8 election, Santana called him over for a private conversation and stated that when the Union wasn't there, the people were receiving raises and that the only reason why "we" were not getting raises was because the Union was in place. He testified

that she stated that the Union was no good and that if the Union wasn't in place, they would be back to the old system where everyone got raises depending on the amount of work put out. According to Ventura, Santana was a bit irate because she wasn't able to receive raises. He testified that she said that once the Union wasn't in place, everyone would be receiving raises. Ventura also testified that he had another similar conversation with Santana, but could not recall when that occurred.

On cross examination, Ventura stated that during the August conversation, Santana mentioned that the Company and the Union were engaged in negotiations and that when negotiations were over, the employees would likely be getting raises. He also testified that he never heard either Sameh Mekhueil or Naomi Santana make statements about raises at the morning meetings or over the public address system.

Jose Luis Tavira testified that on one occasion in May 2014, Santana told him that "they" can't give us more money because everything was "like freezing for the union." After a little leading, Tavira recalled that when he was hired, he was told that the Company gave raises every 3 months and that Santana told him that; "for the union, everything is frozen." At a later point, Tavira recalled that in the context of the frozen statements, Santana used the word, "negotiate." (As noted above, the only time production employees got raises was when the minimum wage was increased either at the Federal or State level. Therefore, an alleged statement that the Company gave raises every 3 months, is inaccurate.)

According to Tavira, he attended the morning meetings and that on one occasion, in response to his question, Santana said that union dues were $50 per month. Tavira testified that when he told Santana that this was a lot of money, Santana replied; "okay, so then vote no." Other than reporting the statement about union dues, Tavira did not indicate that Sameh Mekhueil or Naomi Santana made statements about raises at the morning meetings or over the public address system.

Marlon Colon testified that in late July or early August, he was riding on bus after work with Santana and another employee named Sheniqua McNeil. According to Colon, Santana stated that his vote was needed because if he voted against the Union, "we" would be getting our raises. He states that Santana said that before the Union, the employees got quarterly raises and that the only reason they were not getting a raise was because the Company was negotiating with the Union.

Santana and Mekhueil both denied all of the alleged threats and promises attributed to them by the General Counsel's witnesses. Both testified that they received instructions from a consultant named Mike Rosado and attorney Goldberg about what they could and could not say to employees regarding wages, raises or benefits. They testified that after bargaining began, they were instructed to respond to any employee questions about wages or benefits by stating that the Company and the Union were engaged in bargaining and that they couldn't say anything until an agreement was reached. Santana and Mekhueil testified that when asked about wages or raises, they simply responded that they could not talk about that subject because of the ongoing negotiations.

In support of the testimony of Santana and Mekhueil, the Company called a number of employee witnesses who corroborated their version of events. These employees essentially testified that there were no comments about wages or raises at the morning meetings and that no such comments were made over the public address system. I conclude that no such statements were made in that manner.

Kirsey Gonzalez, an employee called by the Respondent, testified that on one occasion she asked Santana about a wage increase and that Santana replied that everything was in negotiations and that she could not talk about it. This testimony was consistent with the testimony of those General Counsel witnesses who testified that during their conversations with Santana, the latter mentioned negotiations and/or that things were frozen during negotiations.

With respect to the alleged conversation between Marlon Colon and Santana on the bus, Santana credibly testified that during this conversation, Colon spoke about his personal issues and that she solicited him to join a church where she was a minister. She denied that there was any talk about unions, wages or wage increases. Santana's accounting of this event was corroborated by Sheniqua McNeil, an employee who attends the same church.

The bottom line is that the credible evidence shows that at most, Santana, on perhaps one or more occasions, told employees that because the Union and the Company were in contract negotiations, wages were frozen because of those negotiations. I can see how some employees could have construed or interpreted such statements as meaning that no raises would be given because of the Union; or that raises would be given once the Union was out; or that one should look for another job if you wanted a raise. But what some people may have inferred from Santana's remarks is not necessarily the same as what she actually said. I cannot be absolutely certain as to what Santana said to these employees, but I think it is more probable that she merely followed orders and told them that wages were frozen and that she could not say anything else about the matter because the Company and the Union were in the middle of negotiations.

Except for situations where wage increases, (or other increased benefits), had been planned before the advent of a union, or where wage increases have historically been granted on a regular and periodic basis, an employer need not give increases during contract negotiations and may defer them to any collective-bargaining agreement subsequently made. Accordingly, any statements to employees to the effect that wages are frozen pending the outcome of negotiations is simply a statement of what is permissible under the Act and as such cannot violate Section 8(a)(1) of the Act.

The General Counsel also alleges that the Respondent engaged in surveillance by virtue of the following transaction.

Yomaira Franqui, a union representative, was assigned to go the election that was held on August 8, 2014. Among other things, she was there to give instructions to the Union's designated observer, Antonio Trinidad, and to give him a list of persons whose ballots the Union intended to challenge.

For the election, the Company decided to hire an additional contingent of security officers who would monitor the outside of the building during the election. This was done by the Company's security director, Paul Dalton. Dalton testified that for

his part, he mainly stayed inside the building and directed people to the voting area. He also testified that from time to time, he went outside to see what was going on with the additional security guards. In addition to the main building, the Company has an adjacent parking lot that is separated from the sidewalk and street by a fence.

Franqui testified that after the election was over, she and Trinidad went outside to her car that was in the middle of the parking lot. She testified that Dalton (whose name she didn't know at the time), followed them along the sidewalk and observed her and Trinidad from about ten to fifteen feet away. According to Franqui, Dalton paced back and forth while seemingly talking on his phone. Mr. Trinidad did not testify and therefore he did not corroborate Franqui's testimony on this matter.

Dalton credibly denied that he followed Franqui and Trinidad out to the parking lot and testified that when the election was over, he stayed at the front door and watched people leave. According to Dalton, he left the building at around 3 p.m., got into his car, and went home.

In my opinion, the General Counsel's evidence as to this single transaction, allegedly occurring after the election was over, is insufficient to support the allegation that the Company was engaged in spying on employee union activity. In this instance, I am going to credit Dalton's testimony which shows that at most, Franqui may have misconstrued Dalton's walk to his car as being a case where he was following her and Trinidad to the parking lot in order to spy on them.

C. Analysis

Having decided the various 8(a)(1) allegations, I shall now turn to the General Counsel's theory regarding the allegation that the Respondent bargained in bad faith.

Section 8(d) of the Act ''does not compel either party to agree to a proposal or require the making of a concession.'' If a term ''is genuinely and sincerely held, if it is not mere window dressing, it may be maintained forever though it produces a stalemate.'' *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960). 'Nevertheless, the statutory right to refuse to agree or to make a concession, may not be used 'as a cloak . . . to conceal a purposeful strategy to make bargaining futile or fail.''' *H. K. Porter Co.*, 153 NLRB 1370, 1372 (1965). ''Bad faith is prohibited though done with sophistication and finesse . . . [Good-faith bargaining] takes more than mere 'surface bargaining' or 'shadow boxing to a draw.''' Id. at 232. ''It is necessary to scrutinize an employer's overall conduct to determine whether it has bargained in good faith.'' *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984)."

In NLRB v. American National Insurance, 343 U.S. 395, 404, the Supreme Court held that the Board "may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." Notwithstanding that prohibition, the Board has, on rare occasion, considered the contents of contract proposals in order to determine whether an employer (or a union), has engaged in surface bargaining. *McClatchy Newspapers*, 131 F.3d at 1034, citing *NLRB v. Pacific Grinding Wheel Co*., 572 F.2d 1343, 1348 (9th Cir. 1978).

It is the General Counsel's contention that; "by outright rejecting the Union's proposal on union security and dues checkoff, *without explanation*, Respondent frustrated the collective bargaining process and thereby bargained in bad faith…" The 8(a)(5) allegation is based on this single issue and the evidence shows that with the exception of this one issue, the parties reached agreement on all of the other subjects.

In support of this contention, the General Counsel relies heavily on *CJC Holdings, Inc.,* 320 NLRB 1041, 1046 (1996). In that case, the Administrative Law Judge found that the Company illegally implemented its last offer in the absence of a valid impasse. Additionally, he concluded that the Company violated the Act by making unilateral changes during contract negotiations. Finally, the judge concluded that the Company engaged in surface bargaining by, among other things, asserting that it had "philosophical" objections to a dues-checkoff provision and objected to being in the dues collection business. The judge opined that these were not legitimate reasons for refusing to agree to such a provision and constituted evidence of bad faith. At footnote 2 of the Board decision, Member Cohen, although agreeing that the Company's "primary goal was to avoid agreement and reach impasse," stated that he did "not rely on the judge's finding that a company's fundamental opposition to dues check off, on policy grounds, is not a legitimate reason for opposing such a contract provision."

In other cases, the Board or ALJs have offered the opinion that a "philosophical opposition" to dues-check off provisions may constitute evidence of bad-faith bargaining. See for example, *Langston Cos*., 304 NLRB 1022, 1050 (1991), citing *Tiffany & Co*., 268 NLRB 647, 650 (1984). Nevertheless, those cases involved other unlawful conduct in which opposition to a union-security or dues-checkoff provision was only a small part of the evidence taken as a whole. For example, in *Langston Cos*., supra, the Board concluded that the employer (a) refused to negotiate at all until certain unfair labor practice allegations were resolved; (b) bypassed the Union and dealt directly with employees; (c) unlawfully implemented changes to its insurance plan in the absence of an impasse; (d) engaged in surface bargaining with no intent of reaching an agreement; and (e) unlawfully discriminated against employees because of their union activities.

In *Preterm, Inc*., 240 NLRB 654, 673 (1979), an employer refused to consider any union-security provision, and asserted that it believed its employees should have the right to choose whether to join. Finding that the Employer refused to consider any alternative proposal (such as an agency shop clause), and concluding that the Respondent went into negotiations with a fixed mind on this issue, the judge held that the "Respondent's refusal to discuss union shop or any modified form thereof, based upon its alleged 'philosophical opposition' thereto constitutes evidence of a refusal to 'confer in good faith' within the meaning of the Act." Nevertheless, the judge's conclusion that the Respondent engaged in surface bargaining was also based on other conduct, including the Respondent's attempt to exclude from the bargaining unit, certain categories of employees that were in the unit by virtue of the certification of representative. The Board affirmed the judge's conclusion that the Respondent's ultimate goal was not to reach an agreement but to

free itself of the need to deal with the union. It is also noted that in addition to concluding that the Company engaged in surface bargaining, the judge found that the Respondent illegally threatening employees with job loss.

In *Phelps Dodge Specialty Copper Products Co*., 337 NLRB 445 (2002), the Board affirmed the ALJ's decision that an employer's refusal to agree to union security and dues checkoff proposals did not violate the Act. The judge stated:

> This case presents the allegation that the Respondent refused to bargain about union-security and dues-checkoff provisions in the absence of any other bargaining misconduct. The General Counsel wants the Board to conclude, not only that the Company's negotiation positions on these two issues may constitute evidence of bad-faith bargaining, but that such positions constitute, by themselves, a violation of the Act. I do not agree.
>
> The evidence here indicates that the Respondent engaged in good faith bargaining in all other respects and made concessions during negotiations on wages and other matters. The Respondent's position with respect to union-security and dues-checkoff clauses cannot, in my opinion, be considered irrational and it took the time during negotiations to explain its positions. Given the fact that these issues are mandatory subjects of bargaining, neither side can be compelled to agree to the other's position or to even make concessions in its own position. Moreover, there was evidence that some bargaining unit employees, such as those accreted to the unit during the preceding contract term, raised some objections to joining this Union and made their feelings known to management.

The General Counsel would argue that the present case is distinguishable from *Phelps Dodge* because here the Respondent basically stated that its reason for refusing to accept the Union's union-security/dues-checkoff proposal was simply because it didn't have to. Assuming that this was the only thing that was said by the Employer, it would still be a reason, albeit not much of a reasoned reason. On the other hand, I know of no other type of mandatory subject contract proposal that would require, as a matter of law, that the proposal's opponent justify or offer a reason for its opposition. For example, an employer refusing to accede to a union's proposal for a percentage wage increase need not state its reasons for refusing the union's demand. Since the issues of union dues and dues checkoff are mandatory subjects of bargaining, I can see no difference between these particular subjects and any other mandatory subjects of bargaining.

In *St George Warehouse, Inc*., 341 NLRB 904 (2004), the Board made the following comments at footnote 10.

> In finding that the Respondent's rejection of a union-security clause was evidence of surface bargaining, the judge cited *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1043 (1996). In *Bryant & Stratton*, however, the Board expressly declined to adopt the judge's analysis of that issue. See 321 NLRB 1007 fn. 4. Our colleague's reliance on *Hospitality Motor Inn, Inc.,* 249 NLRB 1036 (1980), enfd., 667 F.2d 562 (6th Cir. 1982), cert. denied 459 U.S. 969 (1982), to support the same point is also unavailing. In *Hospitality Motor Inn,* the employer's "philosophical" opposition to a union-security clause was absolute and obstructionist. There, the employer established that the Union's request for a union-security clause would preclude reaching an agreement, even if the parties could reach resolution of all other issues. In addition, the employer stated that it would not agree to a union-security clause, even if "100 percent of the employees signed authorization cards." Id. at 1039. Moreover, as the Board stressed, the employer's intransigent intent not to reach agreement on union-security and dues-checkoff provisions was but one aspect of a "totality of conduct" evincing a failure to bargain in good faith. Id. at 1036 fn. 1. In the instant case, the Respondent's opposition to the Union's demand for a union-security clause was tied to the specific facts of the instant case—the Union's narrow margin of victory—and was not presented as an obstacle to agreement on other terms or an ultimate agreement.
>
> Our colleague relies on *Radisson Plaza* as support for his view that the Respondent's reference, in explaining its opposition to the Union's demand for a union-security clause, to the Union's margin of victory is evidence of bad faith. However, *Radisson Plaza* is factually inapposite. There, the Board found the employer's reference to the election victory was frequent, it permeated the employer's bargaining proposal, and it did not involve a rejection of a union-security clause. 307 NLRB 94, 96 (1992), enfd. 987 F.2d 1376 (8th Cir. 1992). In the instant case, the reference to the Union's narrow victory was only raised as relevant to the Respond Respondent's unwillingness to require all employees to support the Union.

More recently, the Board revisited this issue in *Universal Fuel, Inc*., 358 NLRB No. 150 (2012). The Board stated:

> We agree with the judge, for the reasons discussed in his decision, that the Respondent, Universal Fuel, Inc., violated Section 8(a)(5) and (1) of the Act by engaging in overall bad-faith bargaining with the Union. Thus, as the judge found, in the course of initial contract negotiations, the Respondent:
>
> Opposed the Union's proposal on union security for purely "philosophical" reasons, without advancing any legitimate business justification;
>
> Late in negotiations, reneged on several tentative agreements previously reached with the Union, and made regressive proposals concerning those matters without good cause;
>
> Also late in negotiations, introduced new and unpalatable proposals on subcontracting and picketing without any legitimate business justification;
>
> Insisted on negotiating over a permissive bargaining subject, the amount of fees to be paid under a proposed agency shop arrangement;
>
> Withdrew its October 8 and November 6 contract proposals because the Union had not accepted either in time for the proposal to be approved by the United States government pursuant to the Service Contract Act of 1965; and

> Falsely informed employees that union security was the only issue preventing agreement, and cast blame on the Union.

As did the judge, we find that the Respondent's conduct, viewed in its entirety, indicates that the Respondent was bargaining without a sincere desire to reach a collective-bargaining agreement. See, e.g., *NLRB v. Reed & Prince Mfg. Co.,* 118 F.2d 874, 885 (1st Cir. 1941), cert. denied 313 U.S. 595 (1941). Unlike the judge, however, we find it unnecessary to determine whether any of the individual acts just described was unlawful in and of itself. Instead, the Respondent's conduct, as a whole, supports the judge's determination that the Respondent was not bargaining in overall good faith and thereby constitutes a violation of Section 8(a)(5).

In the present case, I think it cannot be said that the Respondent did not raise business reasons for refusing to accede to the proposed union-security/dues-checkoff provisions. The evidence shows that at the bargaining session held on June 26, 2014, the Company's owner raised a number or questions about these proposals. Most significantly, he noted that if the parties agreed to the wage increase that was on the table, this would mean that if employees were required to pay union dues, some would receive only a nominal increase in their pay and others could receive a net pay below the State or Federal mandated minimum wage. The evidence also shows that the Union's representatives did not respond to the Respondent's concerns.

In my opinion, the evidence in this case shows that the parties bargained in good faith and in fact, reached agreement on all subjects except for the union dues-checkoff provisions. And although it might be said that on balance, the Employer got the better of the Union, the Respondent did agree to a contact that would include some wage increases and a grievance/arbitration procedure. It is therefore my opinion that the evidence cannot show that the Employer was engaged in surface bargaining and that it had no intention of reaching an agreement.

CONCLUSION

For the reasons stated above, I conclude that the complaint should be dismissed.

Dated: Washington, D.C. July 30, 2015